



City Research Online

City, University of London Institutional Repository

Citation: Ormerod, D. C., Choo, A. L.-T. and Easter, R. L. (2010). The "witness anonymity" and "investigation anonymity" provisions. *Criminal Law Review*(5), pp. 368-388.

This is the unspecified version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/3514/>

Link to published version:

Copyright: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

Reuse: Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

Criminal Law Review

2010

Coroners and Justice Act 2009: the "witness anonymity" and "investigation anonymity" provisions

David Ormerod

Andrew L-T Choo

Rachel L. Easter

Subject: Criminal evidence. **Other related subjects:** Criminal procedure. Police

Keywords: Anonymity; Criminal investigations; Witness anonymity orders

Legislation: Coroners and Justice Act 2009 Pt 3

Criminal Evidence (Witness Anonymity) Act 2008

Case: R. v Davis (Iain) [2008] UKHL 36; [2008] 1 A.C. 1128 (HL)

***Crim. L.R. 368 Summary:** *This article offers an analysis of the creation of statutory powers to allow witnesses to give evidence anonymously. The latest provisions are those in the Coroners and Justice Act 2009 replacing the emergency temporary legislation: Criminal Evidence (Witness Anonymity) Act 2008. Consideration is given to that Act, its legislative history and case law. Examination of the new powers for investigation anonymity orders suggests that these are likely to be of symbolic rather than practical significance.*

Introduction

The debate about the circumstances in which it may be permissible for the Crown to secure a conviction based on the evidence of an anonymous witness engages issues which are numerous, complex and controversial. These include: the need to secure evidence in serious cases in which increasingly commonly witnesses are unwilling to provide evidence for fear of reprisals¹; the need to protect witnesses and their rights to security and privacy; the disadvantages faced by the defendant and whether these render the process so unfair as to deny the accused a fair trial; the extent to which defendants can claim a right to "confront" their accuser and whether this is infringed; whether a process can be designed to ensure sufficient safeguards for the rights of the defendant and the witness.

***Crim. L.R. 369** The potential disadvantages to the defendant are significant and substantial: it is impossible to investigate fully the credibility of the anonymous witness; the defendant is worse off than if hearsay is adduced against him or her; the defendant has no opportunity to assess the demeanour of the witness; the defendant's cross-examination is less likely to be effective; the defendant's ability to examine witnesses is unequal to the Crown's; there is a potential conflict with art.6(3)(d) of the European Convention on Human Rights (ECHR); there is no opportunity to confront the witnesses; the defendant is more reliant than normal on the disclosure process; the defendant's relationship with his or her counsel may be put under strain where counsel alone sees the witness; the jury may be likely to treat the use of anonymous witness evidence as implicit evidence that the accused is violent and/or responsible for intimidation. The witness denied anonymity faces at worst a risk to life, at minimum a loss of respect for privacy. The issue is not, of course, one of "balancing" the respective rights; it is a question of when the defendant's right to a fair trial ought to be qualified to protect witnesses' rights (as guaranteed in arts 2, 3, 5 and 8 ECHR).²

While the Criminal Justice Act 2003 has made significant inroads into the hearsay rule so that more evidence can be received from absent witnesses including those in fear (s.116(2)(e)), such witnesses are only spared the need to attend the trial and face the accused and his associates; there is no protection of identity. Equally, while in recent years there has been a greater awareness of the difficulties facing a witness giving evidence and the use of special measures to alleviate the stress of testifying is more commonplace,³ these do nothing to protect witnesses or their families outside the courtroom.

This article considers Chs 1 and 2 of Pt 3 of the Coroners and Justice Act 2009. Chapter 2 will be examined in detail while Ch.1, which is likely to be of less significance in practice, will be treated in outline only. The discussion will commence with a consideration of the decision of the House of Lords in *Davis*,⁴ which led to the enactment of the Criminal Evidence (Witness Anonymity) Act 2008 and, eventually, Ch.2 of Pt 3 of the 2009 Act.

From Davis to the 2009 Act: a brief history

Davis

Davis was convicted of the murders of AK and WM at a party at which Davis admitted being present but claimed to have left before the shooting. Three prosecution witnesses identified Davis as the gunman. To protect their identity, the judge ordered that they would be allowed to give evidence under pseudonyms; any details which might identify them were to be withheld from Davis and his legal advisers; they would be allowed to give evidence from behind screens; their voices **Crim. L.R. 370* would be disguised electronically; and when testifying they could not be asked any questions which might lead to their identification. Davis suspected that the evidence was procured by an ex-girlfriend.

Dismissing his appeal, the Court of Appeal rejected Davis's contention that the protective measures adopted at trial were in conflict with the common law and inconsistent with art.6 ECHR. The House of Lords, however, unanimously overturned the decision of the Court of Appeal, holding that, in cases in which anonymity was preserved in full and the defendant had no opportunity to investigate the credibility of the witness against him, the defendant's right to a fair trial was infringed if the evidence was the sole or decisive evidence against him. In this case, the anonymous witness evidence was the sole or decisive basis for Davis's conviction. In addition, the anonymity prevented effective cross-examination. Davis's defence, which went to the probity and credibility of the witnesses, was gravely impeded by his counsel's inability to explore who the witnesses were and the nature of their contact with Davis.

The 2008 Act

The decision of the House of Lords was handed down on June 18, 2008. Within days of the decision, multi-handed murder trials had collapsed.⁵ The Crown Prosecution Service (CPS) revealed that around 580 cases had anonymity orders operating/pending (of which 290 involved test purchases by undercover officers, 40 involved other police witnesses and 50 involved members of the public).⁶ The Government swiftly announced proposals for "emergency" temporary legislation that would empower courts to make "witness anonymity orders". The Criminal Evidence (Witness Anonymity) Bill had cross-party support in both Houses. Despite dealing with issues of enormous gravity it received only one day of debate in the House of Commons. By July 21, 2008 the Criminal Evidence (Witness Anonymity) Act 2008⁷ was in force, and the Attorney General had produced complementary guidelines on the use of anonymous witnesses: *The Prosecutor's Role in Applications for Witness Anonymity Orders*.⁸

At a subsequent Public Bill Committee hearing, the Director of Public Prosecutions (DPP), Keir Starmer Q.C., shared statistics gathered from the early operation of the 2008 Act. He explained that the police had to pass an application to the CPS to help ensure the measures did not become routine. Any proposed application was considered only by unit or division heads who had **Crim. L.R. 371* "to personally sign off" the application before it was made.⁹ Starmer's figures were from July until December 2008, by which time 137 cases had passed to the CPS for consideration--an average of 20 per month.¹⁰ These cases involved 346 witnesses in total, making an average of almost two per day requesting anonymity during that period.¹¹ Only if the police take anonymity seriously will the procedure remain exceptional, and these statistics cast doubt on that. Starmer clarified that applications were made in respect of 135 out of the 346 witnesses--less than 40 per cent--and of those 129 were granted; this suggests that the CPS was selecting the right cases to take forward.¹² The DPP also explained that only 43 cases involved civilian witnesses, whilst the rest involved police witnesses.¹³ When the statistics are dissected this way they appear less worrying, although arguably they add very considerable weight to suggestions that there should be separate provisions dealing with civilian and police witnesses, as is the case in New Zealand.¹⁴ The six unsuccessful applications,

all involving civilians, were rejected because “the witness did not add sufficiently to the prosecution case to warrant ... an order”.¹⁵ Overall it is not surprising the DPP was satisfied with the “high success rate” in applications made and had confidence in the statutory safeguards.¹⁶ The figures suggest the provisions are clearly capable of being understood and applied by the CPS to filter out cases where an order is unlikely to be granted. More recent statistics support this analysis. Between July 2008 and December 31, 2009, the total number of witnesses for whom police requested the CPS to consider applying for an order was 717 (civilian 193; undercover non-test purchase law enforcement officer: 211; test purchase officer: 280; other (interpreters etc: 33). Some 55 of these requests were rejected by the CPS as untenable. The total number of applications granted by the courts in that period was 343 (civilian 69, undercover officer 144, test purchase officer 117, other 13). The total number of applications refused by the courts was 26 (21 civilians and 5 undercover officers).¹⁷

As noted, the introduction of a separate, streamlined regime for law enforcement officers may have much to commend it. Furthermore, many cases involving applications in respect of police officer witnesses are likely to result in guilty pleas without any witnesses giving evidence, anonymously or otherwise. Better judicial case management in cases that involve police officer witnesses only would assist by forcing the parties to address the issue at plea and case management hearing without the need for a formal application at that stage of the procedure.

***Crim. L.R. 372** It is interesting to note that although there are clearly hundreds of cases in which witness anonymity orders are being made, only a handful have resulted in reported appeals.¹⁸ In part, the paucity of appeals may reflect the successful drafting of the legislation. In part, it may be a reflection of the Court of Appeal's clear and comprehensive commentary on the Act offered in the first case it considered--*Mayers*,¹⁹ in which *Mayers*' appeal was conjoined with those in three other cases: *Glasgow* ; *Bahmanzadeh and Costelloe* ; and *V, P and R*. It is submitted that the court's guidance on the 2008 Act remains pertinent given the almost identical terms in which the relevant provisions of the 2009 Act have been enacted.

More cynically, one might question whether the paucity of appeals reflects the fact that the courts were already adept at dealing fairly with anonymity orders at common law before the House of Lords curtailed that possibility. The Act simply gave the courts a new structure and the seal of parliamentary approval to a process that already operated well in practice. In *Powar*,²⁰ for example, the Court of Appeal affirmed that the trial judge had acted fairly in granting pre-2008 Act witness anonymity orders to six individuals who had witnessed a murder from their houses. The court displayed its pre-Act disposition towards anonymity; emphasising that “the intimidation of witnesses has become an ugly feature of contemporary life”, it suggested that the use of witness anonymity orders should not be limited to the most extreme cases,²¹ but rejected the argument that the provisions should be restricted to cases involving terrorism or gangland killings. In *Glasgow* (an appeal conjoined with *Mayers*), the Court of Appeal was again satisfied that the trial judge had thoroughly addressed the pre-conditions for making a witness anonymity order *before* the statutory framework was in place.²²

The 2009 Act²³

Section 14 of the Criminal Evidence (Witness Anonymity) Act 2008 provided for the expiration of the Act on December 31, 2009, with the Government promising that its temporary emergency provisions would be replaced by more carefully considered ones. In the event, however, Ch.2 of Pt 3 of the Coroners and Justice Act 2009 essentially re-enacts the key provisions of the 2008 Act wholesale with only a few very minor differences. Again, it might be argued that the lack of significant change made to the 2008 Act after time for considered reflection and parliamentary scrutiny is an indication that the provisions are working well. However, there is no doubt that difficult issues remain for the courts, including in particular the ECHR compatibility of the process. This is considered below, after the provisions of Ch.2, ***Crim. L.R. 373** which have been in force from January 1, 2010,²⁴ have been examined in more detail. The provisions apply to England, Wales and Northern Ireland.

Witness anonymity orders

What is a “witness anonymity order”?

This is defined in s.86(1) of the 2009 Act as,

“... an order made by a court that requires such specified measures to be taken in relation to a witness in criminal proceedings as the court considers appropriate to ensure that the identity of the witness is not disclosed in or in connection with the proceedings”.

By s.86(2), the kinds of measures that may be required to be taken include measures for securing the withholding of the witness's name and other identifying details from disclosure; the use of a pseudonym; the prevention of questions that might lead to the witness's identification; the screening of the witness; and the modulation of the witness's voice. These are merely examples of the types of measures that may be taken, drawing on experience from the orders made under the common law pre-*Davis* and listed by Lord Carswell in his speech in *Davis*.²⁵ There is therefore a wide judicial discretion. The types of protection applied for may require careful thought, particularly where there are numerous witnesses. For example, a request for voice modulation in relation to only one witness might lead the accused to suspect that that witness is known to him or her, or has a distinctive voice/accent, rendering it more likely that that witness's protection will be undermined.

Significantly, s.86(4)(a) prevents an order being made which screens a witness from “the judge or other members of the court (if any), or ... the jury (if there is one)”.²⁶ In addition, if voice modulation is used, the witness's natural voice must still be heard by these individuals (s.86(4)(b)). As at common law, the judge and jury see and hear the witness in his or her natural state, thus maximising their opportunity to evaluate the witness's demeanour.²⁷ The provisions are silent as to whether the legal representatives may see the witness: presumably the trial judge will allow this if the advocate so chooses (in *Davis*, counsel had declined the opportunity to see any witness his client was forbidden from seeing).²⁸

The provisions have no part to play where the witness is known to the defendant but the witness seeks to avoid his or her name being revealed to the public.²⁹ Interestingly, in *Powar*,³⁰ the fact that there was inadvertent disclosure to the **Crim. L.R. 374* defence of documents as to who the anonymous witness was did not justify the lifting of the order,³¹ nor did the failure in that case and in *Nazir*³² of the voice modulation system. In both instances it was arguable that the true force of the protection had already been lost and the witnesses' identities were being shielded from the public only.

Orders are available in “criminal proceedings” in the Crown Court, Criminal Division of the Court of Appeal and the magistrates' court (s.97(1)(a)). Orders in the magistrates' court are expected, however, to be very rare, their availability being retained principally because of drug prosecutions involving test purchases tried there.³³ Notably, orders may not be made in the High Court. While it may be unlikely for cases requiring consideration of such orders to arise in the High Court, this court does have an important role to play in respect of judicial review of magistrates' decisions.

No specific offence is created for breach of an order, but such conduct constitutes a contempt of court. The common law rules relating to public interest immunity are unaffected (s.95). Although there is no specific power of appeal against the making of an order, the powers under s.58 of the Criminal Justice Act 2003 for prosecution interlocutory appeals apply,³⁴ but the defence will only have an interlocutory appeal in preparatory hearings. It should be noted however that the Court of Appeal has indicated that interlocutory appeals on witness anonymity decisions ought not to be made³⁵ since the court is not well placed before the trial is even underway to assess the criteria in the Act and the extent to which the defendant is affected.

Under s.91 of the 2009 Act, a witness anonymity order made in relation to any criminal proceedings may in those proceedings subsequently be varied, further varied or discharged where it appears “appropriate” to the court that made it. This may be on the court's own motion or on application by any party if a material change in circumstances has occurred since the order was made or varied. The 2009 Act also makes provision in s.92 for discharge or variation after the proceedings have ended, and in s.93 for discharge or variation by an appeal court.³⁶

The application procedure³⁷

Section 87 regulates the procedure for making an application for a witness anonymity order.³⁸ It re-enacts the provision in the 2008 Act. Despite Government amendments inserted to provide a more detailed system, the provision was one of **Crim. L.R. 375* the most controversial clauses in the 2008 Bill. The procedural provisions were designed to meet the ECHR concerns, as examined by Lord Mance in *Davis*,³⁹ but these provisions have attracted the criticism that the procedure enacted offers

inadequate protection for defendants.

Section 87(2) provides that, on an application by the prosecutor, the identity of the witness may be withheld from any other party to the proceedings before and during the application, but must (unless the court directs otherwise⁴⁰) be revealed to the court. There may be cases involving national security where even the court does not insist on knowing the identity of the witness, although (in accordance with s.86(4)) the witness will be heard and seen by the judge in any event.

All applications made by the prosecution will be governed by the *Attorney General's Guidelines* and *DPP's Guidance*. The *Attorney General's Guidelines* require that an application will only be authorised at an appropriately high level:

"The role of the prosecutor as an independent and impartial minister of justice is of paramount importance. Applications should only be authorised by prosecutors at an appropriately senior level within the prosecuting authority."⁴¹

Under the *DPP's Guidance* this authorisation must be given specifically by the Head of the Complex Casework Unit or the Head of HQ Casework Division.⁴² Additionally, the *Attorney General's Guidelines* provide that a prosecution application may only be made where there are genuine grounds to believe that the court would not otherwise hear evidence which it is in the interests of justice for it to hear.⁴³ These additional procedural safeguards seek to prevent misuse of powers which obviously have the potential to place defendants at significant disadvantage. The importance of the Crown conducting a thorough investigation of any potential witness is underlined by the fact that, in *Mayers*, the court allowed only one of the four conjoined appeals. The conviction that was found to be unsafe was one with numerous unusual factors, not least of which was that the anonymous witness had come to light late, thus denying a proper opportunity for her credibility to be assessed, particularly in view of her long list of previous convictions.⁴⁴ She was known to the victim's family, and aspects of her evidence contradicted that of independent witnesses who were not providing identification evidence.⁴⁵ The court considered that it was abundantly clear that this witness should not have been made the subject of an order. This serves as a reminder of why witness anonymity orders should be used sparingly,⁴⁶ the *DPP's Guidance* suggesting only where "absolutely necessary".⁴⁷ As in any case involving sensitive information, the prosecution may decide that if the court is not prepared to protect the source, the prosecution should not be pursued. In this context, the prosecution will be acutely aware of the duty owed to the witness. If the application is unlikely to succeed, but in simply making ***Crim. L.R. 376** it there is an increased risk to the life or safety of the witness, that may deter an application.

A very different procedure applies on application by a defendant. The identity of the witness must be revealed to the court *and to the prosecutor*, but not to any other defendant (if any) (s.87(3)). Concerns were raised in parliamentary debates that the inequality between the procedure for the defence and the Crown gave rise to unfairness and potential conflict with the ECHR, in particular art.6(3)(d) which provides that the defendant has the right to examine witnesses against him "under the same conditions as witnesses" on his behalf. The practical justification for the requirement that D reveal the identity of the witness he or she wishes to keep anonymous to the Crown is that, unless D1 does so, the Crown cannot investigate that witness and fulfil its disclosure obligations to D2. However, defence applications are also available in single defendant trials, and the same obligation to disclose the witness's identity to the Crown applies. One obvious justification for disclosure even in such cases is that revealing the identity of the witness is necessary if the defendant requires further prosecution disclosure. That process could be achieved by a provision whereby D is given the option of not disclosing the identity of the witness to the prosecution if D is content not to seek further disclosure from the Crown. The principal reason for compulsory defence disclosure of the identity of the proposed witness even in a single defendant case is, therefore, to enable the Crown to make inquiries regarding the witness's credibility, and to prevent the defence from manufacturing witness accounts. That is precisely what the defendant is not entitled to do in the converse situation. Of course, in terms of risk of harm there is no comparison between revealing a defence witness's identity to the Crown and a prosecution witness's to the defence. But the forensic disadvantage faced at trial by the party seeking to cross-examine an anonymous witness is comparable.

A further potential problem is that the Act envisages that witnesses always remain true to the party for whose case their evidence first appears supportive. In some cases, a witness who may well appear to favour the Crown and who might be made guarantees of anonymity during the investigation may turn out to be better suited to the defence--for example, the witness's identification evidence eventually turns out to support D's case. What the court is to do in such circumstances is unclear. The problem

is unlikely to be a significant one except in cases with multiple defendants where the witness's evidence favours one defendant to the detriment of others. In addition, the question arises whether the Crown owes a duty of care to a witness who has been made some promise of anonymity but whose evidence turns out to favour the defence.

During the parliamentary process, numerous amendments were tabled (unsuccessfully) in attempts to insert a requirement that "independent" or "special" counsel (as they are usually known) would be instructed in all cases to assist the court and protect the defendant's interests. The advantages offered by the appointment of special counsel might seem obvious given the heightened duties of disclosure and the need for the defendant to feel confident that the duties have been fulfilled.⁴⁸ Even under the common law process in *Davis* special counsel was appointed. Special counsel might, for example, appear at an ex parte hearing to **Crim. L.R. 377* determine the application for an anonymity order and conduct a cross-examination of the potentially anonymous witness on the basis of earlier instructions taken from the defence. Special counsel might be especially useful where the anonymity application is inextricably linked to public interest immunity (PII) material.

One powerful argument for mandatory appointment of special counsel is that the knowledge that such "independent" examination will occur in every case may deter prosecution and investigative agencies from being too profligate in promising anonymity to potential witnesses.⁴⁹ Such a provision would also be welcome for increasing likely compliance with the ECHR. It gained support from the Joint Parliamentary Committee on Human Rights.⁵⁰ A counter argument is, of course, that appointment of special counsel might give judges a false sense of security and lead them to be less vigilant in scrutinising the prosecution's application. That would be undesirable.

In the 2008 Bill debates the Government remained resistant to the idea of obligatory special counsel, arguing that the issue was too complex to be dealt with in the timeframe in which that Act had to be passed,⁵¹ and that in any event "the court already has an inherent power" to request a special counsel in any given case.⁵² The "notable omission"⁵³ of any reference to independent counsel in the Act may be contrasted with the position in New Zealand.⁵⁴ As Howarth has pointed out, considering the drafters deferred to New Zealand on so many issues, it is strange they did not do so here. The Government promised to revisit the issue, but in the course of the debates on the Coroners and Justice Bill it became apparent that there was no prospect of the inclusion of a reference to independent counsel. While there was some pressure in this direction, Lord Kingsland maintaining, for example, that he did not "understand why the Government are not prepared to put this matter on the face of the Bill",⁵⁵ the Government reiterated that the Attorney General's power to appoint special counsel, coupled with the prosecutor's duty of disclosure, afforded sufficient protection.⁵⁶ It was further emphasised that, because under the Criminal Procedure and Investigations Act Code of Practice "the police are required to have explored all reasonable lines of enquiry" including "enquiries into the witness's credibility", there was no need for a counsel with an investigative role to become part of the proceedings.⁵⁷ Finally, it was argued that the role of the **Crim. L.R. 378* court itself must be to test and probe the case for a witness anonymity order and as a result "the present arrangements are adequate".⁵⁸

The *Attorney General's Guidelines* for prosecutors explicitly acknowledge⁵⁹ that special counsel may be applied for in the exceptional circumstances identified by the House of Lords in *H.*⁶⁰ However, not all witness anonymity applications will fulfil those "exceptional" criteria. While specific reference to special counsel in the statutory provisions might have encouraged their greater use than a mere power to ask the Attorney General for the assistance of a special counsel, it is entirely possible that in the early days of the new provisions special counsel may be relied on heavily when trial judges are treading cautiously. The practical reality is that to keep special counsel to "exceptional cases" may not be easily achievable.

In *Davis* the House of Lords held that,

"... fairness of a trial should not largely depend on the diligent performance of their duties by the prosecuting authorities. All are familiar with notorious cases in which wrongful convictions have resulted from police malpractice, rare though such misconduct is."⁶¹

Despite parliamentary consideration of the position in the course of preparing the 2008 and 2009 Acts, the fairness of the provisions seems very largely to depend on the scrupulously fair operation of the disclosure process by the prosecution. The appointment of special counsel is one obvious way in which such scrupulous fairness can be maintained.

The opportunity for ex parte procedures is governed by s.87(6) and (7). The Explanatory Notes to the Act describe these as reflecting “existing practice” for ex parte prosecution applications, “with the defence able to make representations later at a hearing with the prosecution (and possibly other defendants) present”. In contrast, it is “expected that defence applications will be permitted without other defendants being present but will always be made in the presence of the prosecution”.⁶²

Necessary conditions for an anonymity order

The heart of the scheme lies in ss.88 and 89 of the 2009 Act. An order may only be made subject to the three conditions in s.88. The court must be “satisfied” of each of these conditions in every case, but this is not a formal requirement that the matter be proved to the criminal standard, and presumably the judge may be satisfied by evidence which would be inadmissible at trial. It is at least arguable whether the trial judge can make the decision on the basis of PII material alone which the defence has no opportunity to challenge or know about.⁶³ Even if all three conditions are met there is no obligation to grant an anonymity order.

***Crim. L.R. 379** Condition A By s.88(3), “Condition A” is that the proposed order is necessary,

“(a) in order to protect the safety of the witness or another person or to prevent any serious damage to property, or

(b) in order to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities, or otherwise)”.

The court must make a finding of fact under Condition A and therefore the party seeking the order must bear a burden of satisfying the judge. A voir dire may well be necessary. In *Nazir*,⁶⁴ the Court of Appeal upheld a trial judge’s order made at common law where the judge had conducted a voir dire hearing from the witness in person to establish the reason for refusing to testify without anonymity.

Although the court must be “satisfied” that the proposed order is “necessary” to protect the witness, given the open-ended language of s.88, it can be argued that Condition A will be too readily met. Under s.88(3)(b), it is sufficient that the court is satisfied that there will be real harm to the public interest even if no need for protection of a person or property from harm is shown. This provision has been described as “hopelessly vague”.⁶⁵ It may be enough under s.88(3)(b) that any undercover officers claim simply that without anonymity they will not be able to work in that role again. This triggers the possibility that blanket applications may be made in respect of certain types of officer. The Court of Appeal in *Bahmanzadeh and Costelloe* (conjoined with *Mayers*),⁶⁶ considering the 2008 Act, acknowledged an obvious public interest in maintaining the anonymity of law enforcement officers involved in undercover operations and that a judge would normally be entitled to follow the unequivocal assertion by such an officer that he would not give evidence without an anonymity order. The court dismissed the appeal because the identities of the witnesses “were irrelevant to the issues before the jury”, making the witness anonymity orders fair.⁶⁷ The anonymised witnesses were undercover police officers and so it was held that their anonymity “was necessary to prevent real harm to the public interest”.⁶⁸ We submit that whether anonymity for undercover officers will *always* be necessary in the public interest requires further clarification. To take such a view might well be justified given the difficulties in recruiting officers for this type of work; the nature, extent and expense of the training they are required to undertake; the psychological assessments to which they are subjected; and the selection process which ensures that rigorous integrity checks are undertaken.

Serious doubts might also be raised as to whether it can be “necessary”, as s.88(3)(a) contemplates, to grant anonymity merely to prevent serious damage to ***Crim. L.R. 380** property (without serious injury), albeit that there must be a serious risk of serious damage.⁶⁹ Section 88(6) provides further guidance, requiring the court to,

“... have regard (in particular) to any reasonable fear on the part of the witness--

(a) that the witness or another person would suffer death or injury, or

(b) that there would be serious damage to property,

if the witness were to be identified”.

That does not impose formal requirements that the witness fears death or serious injury before

Condition A is satisfied. Nor is there any requirement that the defendant is the direct cause of the fear.⁷⁰ Many witnesses of serious or organised criminal activity will experience fear generated merely by the circumstances of the crime: will judges readily accept them as “reasonable” fears? The courts will have to take a rigorous approach to Condition A if they are serious about limiting anonymity to “exceptional” cases.

The necessity requirement is clearly an objective test, and the requirement of reasonable fear is a mixed subjective-and-objective test: the witness must be in fear and have reasonable grounds for being so.⁷¹

Condition B By s.88(4), “Condition B” is that the judge is satisfied that, “having regard to all the circumstances, the effect of the proposed order would be consistent with the defendant receiving a fair trial”. This is a provision designed to ensure ECHR compatibility. The Government was confident of compatibility, and the present DPP, in a former role, was also confident that the “Convention does not rule out the use of anonymous witnesses”.⁷² The court in *Mayers* was pleased to find that Condition B reinforced the idea “that a safe conviction cannot be produced by an unfair trial”.⁷³ The Government might be accused of having passed the buck to the trial judge to ensure art.6 fairness by leaving it to his or her judgment on a case-by-case basis. Of course, it might be argued that, in doing so, the Government adopted the least interventionist role. If it had made specific statutory provision that limited the discretion of the courts, it would no doubt have been accused of politicising the issue. It is simpler to leave the judge in charge of deciding what constitutes a “fair trial” in each case. However, the provision could have been drafted more strictly since the judge is obliged in every case to be “satisfied” only that the measure would be “consistent” with the defendant having a fair trial. Could a distinction be drawn between an order “consistent with” and an order “not in contravention of”? Furthermore, having regard to this provision, some might question whether the House of Lords’ denunciation of the common law in *Davis* has had any real effect. Would any of the trial judges who made orders pre-*Davis* really have done so if they were not sure the defendant could have a fair trial?

***Crim. L.R. 381** Condition C By s.88(5), the judge must be satisfied,

“... that the importance of the witness's testimony is such that in the interests of justice the witness ought to testify and--

(a) the witness would not testify if the proposed order were not made, or

(b) there would be real harm to the public interest if the witness were to testify without the proposed order being made”.⁷⁴

Section 88(5)(b) was presumably inserted to preclude an argument that police officers and security service personnel would not satisfy the test in s.88(5)(a) because they would be under a duty to testify and could not (readily) refuse to testify.

It remains unclear how a court would determine the interests of justice requirement. Is that to be left as an open-textured discretion? What factors will be relevant? It may well be relevant, for example, to consider how much other evidence is available, the significance of the evidence in question, and the gravity of the offence.

Mandatory considerations In considering whether Conditions A-C are met, the court *must* have regard to the considerations set out in s.89 and to any other matters which the court considers relevant. Although these are fact-specific, all of the considerations should be addressed. The court in *Mayers* was satisfied with the list of mandatory considerations contained in what is now s.89(2) of the 2009 Act.⁷⁵ These are:

“(a) the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings”.

This is nothing more than a reminder to the court of the general right to know the identity of the accuser.

“(b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his or her evidence comes to be assessed”.

This was a very important factor in the decision in *Davis*. The inability to challenge the credit of the witness is one of the main reasons that the cross-examination is less effective in an anonymous witness case. The important distinction between reliability and credibility is emphasised in the DPP's

Guidance.⁷⁶

“(c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant”.

The specific obligation in s.89(2)(c) to have regard to whether the witness's evidence is the sole or decisive evidence implicating the defendant was introduced by the Government to meet the specific concerns raised by the House of Lords in *Davis* about ECHR compatibility. It does not go as far as some amendments tabled **Crim. L.R. 382* in Parliament which proposed a formal corroboration requirement.⁷⁷ Whether the evidence is “sole or decisive” is only a consideration and not a condition for the granting of an order, but the scope of its application is far from clear. The court in *Mayers* observed that, whilst it did not of itself preclude a witness anonymity order, it directly impinged on whether Condition B had been met, because if the evidence of a witness was either the sole or decisive evidence it was unlikely this condition would be fulfilled.⁷⁸ This explanation will undoubtedly be important as an aid to future interpretations of the 2009 Act on this controversial issue.

In its recent landmark decision in *Horncastle*,⁷⁹ the UK Supreme Court noted, in confirming that there is no rule that hearsay evidence cannot constitute the sole or decisive prosecution evidence, that it may be difficult, if there were such a rule, to determine in a particular case whether hearsay evidence constitutes the “decisive” evidence against the defendant:

“The judge will have to rule inadmissible any witness statement capable of proving ‘decisive’. This will be no easy task ... If ‘decisive’ means capable of making the difference between a finding of guilt and innocence, then all hearsay evidence will have to be excluded.”⁸⁰

The Supreme Court in *Horncastle* also noted that:

“Where the witness is ... present but anonymous, the [2008 Act] provide[s] ... safeguards ... against the risk that the use of the witness' evidence will render the verdict unsafe and the trial unfair.”⁸¹

This suggests that the Supreme Court would be sympathetic to the following position advanced in the *Attorney General's Guidelines* :

“Anonymous witness testimony is not necessarily incompatible with Article 6, even when it is the sole or decisive evidence against the accused. But whether the measures used to allow a witness to give evidence anonymously in any particular case would make the trial unfair has to be evaluated with care on the facts of each case.”⁸²

This issue is discussed further below.

“(d) whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without his or her identity being disclosed”.

The judge must attempt to assess this in light of the disclosure material he has seen in respect of the witness and on his anticipation of what the defence case will be. An accurate and fair assessment depends on the prosecution revealing sufficient detail for the judge. The prosecution ought to disclose to the defence as much detail as **Crim. L.R. 383* is compatible with anonymity for the defence to make some effective challenge to credibility wherever possible. In *Nazir*,⁸³ for example, the Crown revealed to the defence that the witness was an illegal immigrant and that her credibility might therefore be challenged on that basis. As the Court of Appeal made clear in *Mayers*, when considering the 2008 Act, the prosecution must be pro-active in focusing on the credibility of a witness and the interests of justice. It is not enough for the prosecution to excuse its failings by pointing to a defence statement which lacks the necessary detail. Despite such pronouncements, what cannot be ignored is the significance that the disclosure process will have on the fair application of the anonymity orders. In practice, the provisions surely increase the pressure on the defence to provide greater detail in a defence statement.⁸⁴

“(e) whether there is any⁸⁵ reason to believe that the witness --

(i) has a tendency to be dishonest, or

(ii) has any motive to be dishonest in the circumstances of the case,

having regard (in particular) to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant”.

Read literally, the judge is to consider “any reasonable grounds for a belief”. This is extremely wide. The court might also consider, for example, whether the witness has any interest in the outcome of the case, whether the witness was known to the defendant before the incident in question, and whether there is any independent evidence supporting the witness's account.

“(f) whether it would be reasonably practicable to protect the witness by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court”.

This is self-explanatory. The court in *Mayers* was satisfied that the Government's position on witness relocation was correct: it is “a practicable alternative in the rarest of circumstances”.⁸⁶

Section 89(2) is looser than its New Zealand equivalent, which requires the court also to have regard to “the principle that witness anonymity orders are justified only in exceptional circumstances”,⁸⁷ “the gravity of the offence”⁸⁸ and “whether there is other evidence that corroborates the witness's evidence”.⁸⁹ The Joint Committee on Human Rights unsuccessfully advocated the inclusion of the first two considerations in the Bill in 2008.⁹⁰ Whilst it is understandable if not **Crim. L.R. 384* commendable for Parliament to reject a corroboration requirement as introducing too much restriction and complexity, leaving out a statutory requirement that anonymity should be exceptional was arguably a significant failing, and sent the wrong message to prosecutors.

Assessing the factors in s.89(2) will be no easy task and necessarily involves speculation. The court must have “regard to” (not be “satisfied” of) this nonexhaustive list of factors. In the context of hearsay under s.114(2) of the Criminal Justice Act 2003, the test of “having regard to” has been held not to require the trial judge to *investigate* all the factors in every case.⁹¹

As emphasised by the House of Lords in *Davis*, the significant impediment in not knowing the identity of the witness is that the party cannot challenge his or her credibility either generally or in relation to the matters in issue. Section 89(2) seeks to underline the significance of credibility in paras (b) and (e). Recognition of their heightened importance was demonstrated by the fact that amendments were tabled (albeit unsuccessfully) to elevate para.(e) from a “mere” factor to be considered in what is now s.89 to an essential condition under s.88.⁹² Paragraph (e) may well prove troublesome in practice. If the defendant does not know who the witness is, it is difficult for him or her to provide the court with material or even, for example, arguments as to why that witness does have a tendency to be dishonest. Once again, the defendant is at the mercy of the disclosure regime and the ability of the judge to anticipate from material disclosed any likely motives the witness may have.

In sum, in ss.88 and 89 the Government has sought to build into the process numerous safeguards, drawing on the practice at common law, the suggestions in Lord Carswell's speech in the House of Lords in *Davis*, and the New Zealand Act. Although not incorporating every one of the possible safeguards, it is submitted that the party seeking the grant of an order under the Act will face no less onerous an obligation than at common law.

Jury warnings

On a trial on indictment with a jury, the judge must warn appropriately to prevent prejudice to the defendant from the anonymity order being followed.⁹³ Specimen directions have been drafted by the Judicial Studies Board.⁹⁴ In *Mayers* and in *Nazir* the trial judges' directions were found to be perfectly satisfactory.⁹⁵

Investigation anonymity orders

Chapter 1 of Pt 3 of the Coroners and Justice Act 2009, which deals with “investigation anonymity orders”, will come into force on a date to be determined.⁹⁶ Such orders were not provided for in the 2008 Act. The premise of such orders is that anonymity during criminal investigations might be promised in return for information. The order itself is one made by a justice of the peace prohibiting the disclosure of information identifying an individual as having aided an investigation **Crim. L.R. 385* into a qualifying offence.⁹⁷ It is an offence for a person to disclose information in contravention of such an order,⁹⁸ and only senior figures can make applications to a justice of the peace for an order.⁹⁹ In itself the scheme might sound sensible, but the provision is so hedged with qualifications that we doubt its practical value. The Government's aim is clearly to induce victims and witnesses of “street gangs, and gun and knife crime” to assist the police.¹⁰⁰ A pre-condition for an order being made is a belief on reasonable grounds that the individual “has reasonable grounds for fearing intimidation or

harm".¹⁰¹ Moreover, the orders are available only in very specific circumstances. The list of qualifying offences is tightly drawn: the offence must be murder or manslaughter, and it must have been caused by a firearm or knife.¹⁰² Among the matters of which the justice of the peace must also be satisfied on reasonable grounds are "that the person likely to have committed the qualifying offence ... was aged at least 11 but under 30 at the time the offence was committed",¹⁰³ and that this person is likely to have been a member of a group in which the majority of the members appear to have been of that age.¹⁰⁴ In short, these are only of value to frightened witnesses to gun and knife killings committed by gangs of 11 to 30-year-olds.

Whether these are of anything more than symbolic value remains to be seen. The Bar Council considers investigation anonymity orders "unlikely to be used in practice",¹⁰⁵ whilst JUSTICE questions their necessity given the well-known "concept of the police informant, who can be protected by public interest immunity proceedings".¹⁰⁶ The Government, however, believes that a witness protected by an investigation anonymity order could prove invaluable, opening up new leads in an investigation.¹⁰⁷ Another troubling aspect of the provisions is that their focus on gang-related crime could be easily lost; the Secretary of State can repeal or modify the pre-conditions that relate to gang behaviour,¹⁰⁸ and is also able to add an offence to the qualifying list or remove one from it.¹⁰⁹ The potential is **Crim. L.R. 386* therefore present to change completely the direction and scope of the investigation anonymity order.

Principal principled problems

Confrontation

In *Mayers*, the court was quick to assert that in general the 2008 Act did not affect a number of key principles in English criminal trials. In particular, it was asserted that the confrontation principle was unaffected.¹¹⁰ This is questionable. There are a number of components to confrontation,¹¹¹ one of which, effective cross-examination, is inhibited by witness anonymity orders. A second component, orality and openness, is likewise affected: can proceedings be said to be truly "oral" when a witness's natural and recognisable voice is distorted? Arguably they cannot, just as the use of screens and the suppression of a witness's identity make it difficult to claim a trial is open, regardless of how necessary the measures were. Thirdly, confrontation requires the presence of both the witness and the accused in court; whilst this still occurs in a literal sense, the accuser does not have to look the accused in the eye when a witness anonymity order is in effect.

Sole or decisive evidence

Whether the evidence of the anonymous witness provides the sole or decisive evidence may well be a crucial factor in determining the fairness of the trial. Some commentators take the view that the provisions of the Act are incompatible with art.6 in so far as they permit reception of anonymous witness evidence that is decisive.¹¹² The *DPP's Guidance* warns that if the anonymous witness evidence is "truly" sole or decisive it is unlikely that an application for a witness anonymity order will be granted.¹¹³ Such a blunt assertion may be difficult to maintain in the light of the statements made in *Horncastle* in the Supreme Court. Lord Phillips in *Horncastle*¹¹⁴ observed:

"So far as a sole or decisive rule is concerned, I am not persuaded that there is a difference in principle between its existence in relation to absent witnesses and its existence in relation to anonymous witnesses. Each situation results in a potential disadvantage for the defendant. The extent of that disadvantage will depend on the facts of the particular case. I cannot see why a sole or decisive test should apply in the case of anonymous evidence but not in the case of a witness statement. The critical question is whether, in either case, the demands of a fair trial require that a sole or decisive test should apply regardless of the particular circumstances and, in particular, regardless of the cogency of the evidence."¹¹⁵

**Crim. L.R. 387* In *V, P and R* (conjoined with *Mayers*) the Court of Appeal made important points on the subject of anonymous hearsay evidence.¹¹⁶ The court agreed with the trial judge that the 2008 Act could not be used to allow statements by unidentified witnesses to be read in court.¹¹⁷ The court's view was that the Act required that "any witness who gave oral testimony at trial, whether anonymously, or screened, is there to be cross-examined".¹¹⁸ The Supreme Court in *Horncastle* also laid great emphasis on this point. It should be noted however that, technically, hearsay evidence from

an unidentified witness may be read under ss.114(1)(d), 117 and 118(1) of the Criminal Justice Act 2003.¹¹⁹

In relation to sole or decisive evidence from an anonymous witness that is not also hearsay, defence advocates might still have much to be concerned about bearing in mind the comments of the Court of Appeal in *Mayers and Powar*, and the sentiments expressed by the Supreme Court in *Horncastle* (above). As Lord Mance noted in *Davis*,¹²⁰ Strasbourg has not had the final word on sole or decisiveness. It is about to have that opportunity when the Grand Chamber hears the UK Government challenge to the judgment in *Al-Khawaja and Tahery v United Kingdom*.¹²¹

The position is much clearer and in practical terms almost impossible to challenge where the defendant can be proved to be a cause of the need for anonymity. As Lord Carswell noted in *Davis*,¹²² a defendant may find it difficult to argue his trial was unfair if the reason for the witnesses giving anonymous evidence was that he or his associates had threatened them.

Conclusion

In *Davis*, the House of Lords refused to develop the common law even in the face of the chronic problem of witness intimidation. Witness anonymity orders at common law were an infringement of the fair trial process. The House openly invited Parliament to respond.¹²³ Parliament did so swiftly. The crucial question now is: what prevents a witness anonymity order under the 2009 Act from also being held to infringe the defendant's right to a fair trial? The answer seems to be that although the House of Lords was not prepared to countenance the common law producing convictions based on evidence from anonymous witnesses, the Law Lords did not exclude the possibility that a conviction secured in reliance on such **Crim. L.R. 388* evidence would be unfair or unsafe if sanctioned by Parliament. The difference, and what is likely to insulate witness anonymity orders under the Act from successful challenge, is simply that "Parliament has spoken".

Will the provisions prove to be "the most serious single assault on liberty in living memory ... result[ing] in thousands of unfair trials"?¹²⁴ Ironically, the answer lies in the hands of the same judges from whom the House of Lords removed the powers in *Davis* and crucially with the prosecutors who must act with scrupulous fairness in their role as "ministers of justice" in such cases. Whilst jurisprudence on witness anonymity orders has not developed far yet, it is clear that a number of important statements have already been made by the Court of Appeal. As the body of relevant case law grows and matures, buttressing the statutory provisions, it will only serve to entrench further the concept of witness anonymity in English criminal procedure.

Lord Denning's observation that "in the very pursuit of justice our keenness may outrun our sureness and we may trip and fall"¹²⁵ was quoted by several Parliamentarians in the course of the hasty 2008 legislative process. Disappointingly, the virtually wholesale entrenchment in "permanent" legislation of the "temporary" provisions demonstrates that this was no temporary slip. Indeed, witness anonymity orders are now set to be accompanied by investigation anonymity orders. The Lord Chancellor provided assurances that the judiciary would be encouraged to monitor and record all witness anonymity orders made under the 2008 Act so that lessons might be learned for the forthcoming "permanent" legislation. It is unfortunate that there were no lessons that were considered to be worth learning, other than those from the handful of decided appeals.

We are grateful to Rudi Fortson and Kingsley Hyland for comments on an earlier draft. David Ormerod would like to thank the Criminal Bar Association and in particular Duncan Penny for permission to use material from a lecture delivered at the Central Criminal Court in November 2008.

Crim. L.R. 2010, 5, 368-388

-
1. R. Tarling et al., *Victim and Witness Intimidation: Findings from the British Crime Survey* (2000). The 2000 and 2002 Witness Satisfaction Surveys revealed that over half of witnesses were concerned or worried about attending court. Their primary concerns were about seeing the defendant and more general pre-court nerves: W. Maynard, *Witness Intimidation: Strategies for Prevention* (Police Research Group Crime Detection and Prevention Series Paper 55) (1994). See also the comments of Sir Igor Judge P. in *Davis* [2006] EWCA Crim 1155; [2006] 1 W.L.R. 3130 at [8]-[10].
 2. See Andrew Ashworth's memorable expression of anxiety about "the shadowy and metaphorical world of balancing": "Redrawing the Boundaries of Entrapment" [2002] Crim. L.R. 161, 170. Lord Scott recently recognised this explicitly in *HM Advocate v Murtagh* [2009] UKPC 36; 2009 S.L.T. 1060 at [43], dealing with art.6 rights and witnesses' rights in the

context of disclosure. cf. the language in *Doorson v Netherlands* (1996) 22 E.H.R.R. 330 ECtHR at [70].

3. See especially the provisions of the Youth Justice and Criminal Evidence Act 1999, as amended by the Coroners and Justice Act (C&JA) 2009 and discussed in this issue by Laura Hoyano, p.345.
4. *Davis* [2008] UKHL 36; [2008] 1 A.C. 1128.
5. *The Times*, June 25, 2009, pp.6-7.
6. The remainder were cases pending sentence or pending appeal. See *Hansard*, HC Vol.478, col.1304 (July 8, 2008) (J. Straw). See also *Hansard*, HC Vol. 478, col.1288 (July 8, 2008) (M. Eagle).
7. See generally L. Campbell, "Organised Crime, Anonymous Witnesses and Fair Trials in Ireland: Responding to *R. v Davis* " (2008) 6 *International Commentary on Evidence* 9, considering the position in Ireland; J. Doak and R. Huxley-Binns, "Anonymous Witnesses in England and Wales: Charting a Course from Strasbourg?" (2009) 73 *J. Crim. L.* 508; K. Kerrigan and M. Stockdale, "Can Fair Trial Rights be Balanced against Other Interests?" [2009] 1 *Web J.C.L.I.*; A.G. Ward, "The Evidence of Anonymous Witnesses in Criminal Courts: Now and into the Future" (2009) 21 *Denning L.J.* 67.
8. These are available from <http://www.attorneygeneral.gov.uk/Publications/Documents/Attorney%20General%20-%20Guidelines%20Witness%20Anonymity%20-%20July%202008.pdf> [Accessed February 23, 2010] (hereafter *Attorney General's Guidelines*).
9. Public Bill Committee on the Coroners and Justice Bill (February 5, 2009), col.108 (DPP). The *DPP's Guidance on Witness Anonymity* is available at http://www.cps.gov.uk/publications/directors_guidance/witness_anonymity.html [Accessed February 23, 2010] (hereafter *DPP's Guidance*).
10. Public Bill Committee on the Coroners and Justice Bill (February 5, 2009), col.110.
11. Public Bill Committee on the Coroners and Justice Bill (February 5, 2009), col.109.
12. Public Bill Committee on the Coroners and Justice Bill (February 5, 2009), col.109.
13. Public Bill Committee on the Coroners and Justice Bill (February 5, 2009), col.109.
14. cf. Evidence Act 2006 ss.108-109 (undercover police officers) with ss.110-119 (civilian witnesses).The New Zealand provisions were based on the proposals in the valuable discussion paper produced by the New Zealand Law Commission, No.29 *Evidence Law--Witness Anonymity* (1997).
15. Public Bill Committee on the Coroners and Justice Bill (February 5, 2009), col.109 (DPP).
16. Public Bill Committee on the Coroners and Justice Bill (February 5, 2009), cols 109-110.
17. Thanks to Dan Jones of CPS HQ for these figures.
18. Our researches revealed only: *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915; *Power* [2009] EWCA Crim 594; [2009] 2 Cr. App. R. 8 (p.120); *Nazir* [2009] EWCA Crim 213; *Chisholm* [2008] EWCA Crim 3228; *Johnson and Wint* [2009] EWCA Crim 752; *Chisholm* [2010] EWCA Crim 258.
19. *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915.
20. *Power* [2009] EWCA Crim 594; [2009] 2 Cr. App. R. 8 (p.120).
21. *Power* [2009] EWCA Crim 594; [2009] 2 Cr. App. R. 8 (p.120) at [63]. See also *Nazir* [2009] EWCA Crim 213 at [36].
22. *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915 at [76].
23. See the Ministry of Justice circular describing the changes of significance: <http://www.justice.gov.uk/about/docs/circular-2009-08-witness-anonymity.pdf> [Accessed February 23, 2010].
24. C&JA 2009 s.182(3). Sections 1-9, and s.14, of the 2008 Act cease to have effect (C&JA 2009 s.96). Continuity of an order made before January 1, 2010 under the 2008 Act is guaranteed (C&JA 2009 Sch.22 Pt 3 para.16(1)).
25. *Davis* [2008] UKHL 36; [2008] 1 A.C. 1128 at [59].
26. Unlike s.2(4)(a)(iii) of the 2008 Act, there is no provision to ensure that the anonymous witness cannot be seen by "any interpreter or other person appointed by the court to assist the witness".
27. Although whether that is a reliable indicator of credibility is highly controversial: O.G. Wellborn III, "Demeanor" (1991) 76 *Cornell Law Review* 1075.
28. cf. *Power* [2009] EWCA Crim 594; [2009] 2 Cr. App. R. 8 (p.120), in which counsel saw and heard the witness with the defendant's consent.

29. See very recently on this concern the NZ Law Commission Report: *Suppressing Names and Evidence* (Report 109) (2009).
30. *Power* [2009] EWCA Crim 594; [2009] 2 Cr. App. R. 8 (p.120).
31. *Power* [2009] EWCA Crim 594; [2009] 2 Cr. App. R. 8 (p.120) at [75]-[80].
32. *Nazir* [2009] EWCA Crim 213 at [54].
33. Baroness Scotland, *Hansard* HL Vol.703, col.897 (July 10, 2008). There is also the possibility of hearings dealing with control orders.
34. See recently D. Ormerod et al., "Prosecution Appeals: Too Much of a Good Thing?" [2010] Crim. L.R. 169.
35. See *Chisholm* [2008] EWCA Crim 3228 at [16] per Latham L.J., appeal under Criminal Procedure and Investigations Act 1996 s.35.
36. See also the *DPP's Guidance*, paras 52-55. Should it be necessary to discharge or vary any order made under the 2008 Act, the provisions of the 2009 Act are to apply on or after January 1, 2010 for such discharge or variation (C&JA 2009 Sch.22 para.16).
37. Note that applications made under s.3 of the 2008 Act, but which are heard on or after January 1, 2010, are treated as applications made under s.87 of the 2009 Act. It is the conditions in s.88 of the 2009 Act which must be satisfied (C&JA 2009 Sch.22 Pt 3 para.16(2)).
38. See also Criminal Procedure Rules r.29 and *DPP's Guidance*, paras 43-50.
39. *Davis* [2008] UKHL 36; [2008] 1 A.C. 1128 at [67]-[90].
40. See the procedure in *DPP's Guidance*, paras 14-17.
41. *Attorney General's Guidelines*, para.B4.
42. *DPP's Guidance*, para.36.
43. *Attorney General's Guidelines*, para.A2.
44. *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915 at [50].
45. *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915 at [51].
46. *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915 at [52].
47. *DPP's Guidance*, para.60.
48. *Hansard*, HC Vol.478, col.1322 (July 8, 2008) (D. Howarth). cf. the disadvantages noted by Lord Bingham in *H* [2004] UKHL 3; [2004] 2 A.C. 134 at [22].
49. *Hansard*, HC Vol.478, col.1342 (July 8, 2008) (D. Hogg).
50. Joint Committee on Human Rights, Twenty-sixth Report of Session 2007-08, *Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill* (2008) HL Paper No.153, HC Paper No.950 (Session 2007/08), p.3.
51. *Hansard*, HC Vol.478 col.1352 (July 8, 2008) (J. Straw).
52. *Hansard*, HC Vol.478 col.1352 (July 8, 2008) (J. Straw).
53. D. Howarth, "The Criminal Evidence (Witness Anonymity) Act 2008" [2008] 8 Arch. News 6, 8.
54. Evidence Act 2006 s.115(1) provides that, "[f]or the purposes of considering an application for a witness anonymity order ..., the Judge may appoint an independent counsel to assist the Judge".
55. *Hansard*, HL Vol.710, col.1212 (May 18, 2009) (Lord Kingsland).
56. Statement by J. Straw (personal communication, December 3, 2008), <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/57/57we08.htm> [Accessed February 23, 2010].
57. Statement by J. Straw (personal communication, December 3, 2008).
58. Statement by J. Straw (personal communication, December 3, 2008). See also the statement of Maria Eagle: Public Bill Committee, March 5, 2009, col.549.
59. *Attorney General's Guidelines*, para.D2. See also *Consolidated Criminal Practice Direction*, para.I.15.17.

60. *H* [2004] UKHL 3; [2004] 2 A.C. 134. See also *R. (on the application of Malik) v Manchester City Council* [2008] EWHC 1362; [2008] 4 All E.R. 403.
61. *Davis* [2008] UKHL 36; [2008] 1 A.C. 1128 at [31]. See also *DPP's Guidance*, para.11.
62. Explanatory Notes, para.466, http://www.opsi.gov.uk/acts/acts2009/en/ukpgaen_20090025_en_6 [Accessed February 23, 2010].
63. cf. *Ali v Revenue and Customs Prosecutions Office* [2008] EWCA Crim 1466; (2008) 172 J.P. 516 in relation to hearsay under s.114 of the Criminal Justice Act 2003. See generally, on the problems of establishing such preliminary matters, R. Pattenden, "The Proof Rules of Pre-Verdict Judicial Fact-Finding in Criminal Trials by Jury" (2009) 125 L.Q.R. 79 or R. Pattenden, "Pre-Verdict Judicial Fact-Finding in Criminal Trials with Juries" (2009) 29 O.J.L.S. 1.
64. *Nazir* [2009] EWCA Crim 213.
65. JUSTICE, "Criminal Evidence (Witness Anonymity) Bill, Briefing for House of Commons (All Stages)" (July 7, 2008), p.10. See also the comments of Edward Garnier, Public Bill Committee, March 5, 2009, col.561, describing it as "vague, wide and open to mischievous interpretation".
66. *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915 at [30]-[35].
67. *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915 at [79] and [88].
68. *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915 at [86].
69. *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915 at [28]-[29].
70. *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915 at [28]. Concerns about threats from animal liberation activists may lie behind this element of the section.
71. *Powar* [2009] EWCA Crim 594; [2009] 2 Cr. App. R. 8 (p.120) at [62].
72. K. Starmer, *European Human Rights Law* (1999), p.290.
73. *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915 at [36].
74. Whereas, under s.4(5) of the 2008 Act, the focus was on the importance "that the witness should testify" (in the interests of justice), the focus for the purposes of s.88(5) of the 2009 Act is on the importance of the witness's *testimony* and the extent to which there would be "real harm to the public interest" were the witness not to testify.
75. *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915 at [19].
76. *DPP's Guidance*, paras 29-35.
77. See that of Lord Kingsland, *Revised Marshalled List of Amendments to be Moved in Committee*, July 15, 2008, Amendment 8A and 8B.
78. *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915 at [23]. The evidence of the anonymous witnesses was not sole or decisive in *Powar* [2009] EWCA Crim 594; [2009] 2 Cr. App. R. 8 (p.120) at [88]; nor in *Nazir* [2009] EWCA Crim 213 at [52]; nor in *Johnson and Wint* [2009] EWCA Crim 752 at [24].
79. *Horncastle* [2009] UKSC 14; [2010] 2 W.L.R. 47.
80. *Horncastle* [2009] UKSC 14; [2010] 2 W.L.R. 47 at [90].
81. *Horncastle* [2009] UKSC 14; [2010] 2 W.L.R. 47 at [92].
82. *Attorney General's Guidelines*, para.A3.
83. *Nazir* [2009] EWCA Crim 213.
84. See the comments of Lord Judge C.J. in *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915 at [12] and [21]. Arguably, the enhanced obligation as introduced by s.60 of the Criminal Justice and Immigration Act 2008 already imposes this.
85. Emphasis added.
86. *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915 at [9].
87. Evidence Act 2006 s.112(5)(b).
88. Evidence Act 2006 s.112(5)(c).

89. Evidence Act 2006 s.112(5)(f).
90. Joint Committee on Human Rights, *Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill* (2008), HL Paper No.153, HC Paper No.950 (Session 2007/08), p.3.
91. *Taylor* [2006] EWCA Crim 260; [2006] 2 Cr. App. R. 14 (p.222).
92. See *Hansard*, HC Vol.478, col.1358 (July 8, 2008).
93. C&JA 2009 s.90.
94. A new version of the Benchbook is being prepared.
95. See *Nazir* [2009] EWCA Crim 213 at [58] for an extract of such a direction.
96. Criminal Procedure Rules governing such orders have, however, been prepared.
97. C&JA 2009 s.76(1).
98. C&JA 2009 s.76(10).
99. C&JA 2009 s.77(1). Section 81, however, allows for a delegation of the functions to another person, with no qualifying rank or level of experience required. It would therefore seem pointless to specify in s.77(1) that only those in senior roles can make the applications.
100. Statement by J. Straw (personal communication, December 3, 2008), <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/57/57we08.htm> [Accessed February 23, 2010].
101. C&JA 2009 s.78(7).
102. C&JA 2009 s.74(1)-(3).
103. C&JA 2009 s.78(4).
104. C&JA 2009 s.78(5)-(6).
105. Bar Council, "Coroners and Justice Bill 2009: A Parliamentary Briefing Paper Prepared for the Second Reading in the House of Commons on 26th January 2009" (January 2009), para.39.
106. JUSTICE, "Coroners and Justice Bill: Briefing on Second Reading, House of Commons" (January 2009), para.23. See also House of Commons Research Paper No.09/27, *Coroners and Justice Bill Committee Stage Report*, p.29.
107. Statement by B. Prentice (personal communication, February 5, 2009), <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/57/57we05.htm> [Accessed February 23, 2010].
108. C&JA 2009 s.78(10).
109. C&JA 2009 s.74(4)(a). See the recognition of this in Public Bill Committee on the Coroners and Justice Bill, cols 503-504 (March 3, 2009) (M. Eagle).
110. *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915 at [5].
111. See, recently, I. Dennis, "The Right to Confront Witnesses: Meanings, Myths and Human Rights" [2010] Crim. L.R. 255.
112. See Doak and Huxley-Binns, "Anonymous Witnesses in England and Wales" (2009) 73 J. Crim. L. 508, 528-529, and Campbell, "Organised Crime, Anonymous Witnesses and Fair Trials in Ireland" (2008) 6 *International Commentary on Evidence* 9, 15.
113. *DPP's Guidance*, para.5.
114. *Horncastle* [2009] UKSC 14; [2010] 2 W.L.R. 47.
115. *Horncastle* [2009] UKSC 14; [2010] 2 W.L.R. 47 at [50].
116. *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915 at [93].
117. *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915 at [102].
118. *Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915 at [103]. This principle has been endorsed by the Supreme Court in *Horncastle* [2009] UKSC 14; [2010] 2 W.L.R. 47 at [13] of Annex 4.
119. cf. the view in *Horncastle* in the Court of Appeal ([2009] EWCA Crim 964; [2009] 4 All E.R. 183 at [48]), and in the Supreme Court ([2009] UKSC 14; [2010] 2 W.L.R. 47 at [92]), where Lord Phillips states: "In particular the legislation

does not permit the admission of the statement of a witness who is neither present nor identified. Where the witness is unavailable but identified, or present but anonymous, the respective Acts provide the safeguards to which I have referred earlier against the risk that the use of the witness' evidence will render the verdict unsafe and the trial unfair." It is respectfully submitted that this involves a misinterpretation of the 2003 Act provisions.

- [120.](#) *Davis* [2008] UKHL 36; [2008] 1 A.C. 1128 at [89].
- [121.](#) *Al-Khawaja and Tahery v United Kingdom* (2009) 49 E.H.R.R. 1 ECtHR.
- [122.](#) *Davis* [2008] UKHL 36; [2008] 1 A.C. 1128 at [60]-[61].
- [123.](#) *Davis* [2008] UKHL 36; [2008] 1 A.C. 1128 at [27], [44]-[45] and [98].
- [124.](#) Geoffrey Robertson Q.C., *Guardian*, July 8, 2008.
- [125.](#) *Jones v National Coal Board* [1957] 2 Q.B. 55 CA at 64-65.

© 2014 Sweet & Maxwell and its Contributors

